No. 22096

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HENRIETTA M. FAUCHER, also known as H. M. FAUCHER,

Appellant,

vs.

DOLORES KNOLL LOPEZ, LOUISE M. GIOVANNONI, and JOSEPH E. HAZEL,

Appellees.

APPELLANT'S OPENING BRIEF.

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Introductory Statement.

This is an appeal by Henrietta M. Faucher, also known as H. M. Faucher, from a judgment entered by the District Court sitting with a jury after a directed verdict in favor of Appellees adjudicating Apellant a bankrupt [R. 396, 397, 398 and 399][1] and from the findings and report of the Special Master and the affirmation thereof by the Court.

The cause was brought to bar by Appellees' filing of an Involuntary Petition in Bankruptcy against Appellant [R. 65]. The District Court, pursuant to Rule

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[1]References to the Clerk's record of proceedings are denoted "R."

References to the trial before the Special Master are denoted "S.M. Tr."

References to the trial before the District Court are denoted "D.C. Tr."

53 (e) (2) of the Bankruptcy Act appointed Joseph J. Rifkind Special Master as a part of its Pretrial Conference Order of April 7, 1966, and thereafter, a trial was held before the Honorable Joseph J. Rifkind, as Special Master, without a jury, in connection with the non-jury issues as set forth in the said Pretrial Conference Order. The Report of the Special Master was filed on August 12, 1966 [R. 350], and over the objection of Appellant, the Report of the Special Master was affirmed by the District Court by order filed February 9, 1967, which order was modified by order of the District Court filed May 3, 1967 [R. 367]. That thereafter, a trial was held before the District Court sitting with a jury, in connection with the remaining jury issues and after completition of testimony, the District Court, upon motion of Appellees granted a directed verdict, discharged the jury and issued its findings of fact, conclusions of law and judgment [R. 396, 397, 398 and 399]. Appellant made a motion for new trial [R. 369] which motion was denied and thereafter filed her Notice of Appeal [R. 400].

Statement of Jurisdiction.

The statutory jurisdiction of this cause in the District Court, exists pursuant to the Bankruptcy Act, United States Code, Title 11, Section 95 (b).

The jurisdiction in the United States Court of Appeals is conferred by the United States Code, Title 28, Section 1294.

Statement of the Case.

On May 13, 1963, Appellees herein filed a Creditors Petition in Involuntary Bankruptcy against Appellant whch alleged, in substance, that Appellant within four months next preceding the filing of the Petition committed acts of bankruptcy in that she suffered and permitted, while insolvent, a Writ of Attachment to be issued against her on March 13, 1963, which lien was not vacated or discharged within 30 days from the date of its creation and in addition, that the Appellant did suffer or permit on or about March 22, 1963, the appointment of a Receiver to take charge of certain of her property at a time when she was insolvent. That Appellees therefore prayed that Appellant be adjudged by the Court to be a bankrupt [R. 65-69].

That thereafter, on August 21, 1963, Appellant herein filed her Answer to the Involuntary Petition in Bankruptcy [R. 71-73], which Answer substantially denied the moving allegations of the Petition in Bankruptcy and further alleged, by way of separate affirmative defense, that the monies alleged to have been delivered by Appellees constituted loans and as such were usurious in nature, in that the monies repaid or agreed to be repaid to Appellees and each of them, exacted or sought to exact interest and bonus or discount in excess of the legal rate of interest under and pursuant to the laws of the State of California. Said Answer further alleged that as a result of the acts of Appellees in either obtaining or seeking to obtain usurious interest under California law, that Appellees were before the Bankruptcy Court as a Court of Equity, with unclean hands and should therefore be precluded from obtaining equitable relief therefrom [R. 71-74]. Thereafter,

Appellant filed her demand for a jury trial on August 21, 1963 [R. 75].

The following issues of fact and questions involved were before the Court and submitted to the Special Master for trial without a jury:

I. Whether the claims asserted by Appellees are debts of Appellant.

II. Whether said claims, if any, are secured or unsecured.

III. Whether Appellant owed debts in excess of $1,000.00.

IV. Whether Appellees have unclean hands and are therefore barred from proceeding with their Involuntary Petition in Bankruptcy.

V. Whether the Appellant is estopped to claim that Appellees had unclean hands.

VI. Whether under the circumstances of the present cause the burden of proof on the issue of insolvency shifts from Appellees to Appellant.

VII. Whether the transactions which are the basis of the Involuntary Petition in Bankruptcy, are usurious.

The following issues of law were also referred to the Special Master:

I. Whether the insolvency of Appellant may be inferred from evidence that certain obligations of the Appellant were not paid when due at the time of or an instant before the alleged act of bankruptcy occurred.

II. Whether the insolvency of Appellant may be inferred from evidence that certain obligations

of the Appellant were not paid when due subsequent to the time when the acts of bankruptcy allegedly occurred.

The further questions and issues involved which were reserved for trial before a jury were as follows:

I. Whether at the time of the levy of attachment on March 13, 1963, or at the date of the appointment of the State Court Receiver on March 22, 1963, Appellant was insolvent under either of the following tests:

(a) The total of her liabilities exceeded the total aggregate of her assets taken at their fair value; or

(b) She was unable to pay her debts as they matured. (Pretrial Conference Order, April, 7, 1966).

Specification of Errors.

I.

Appellant was prevented from having a fair trial because of the irregularities in the proceedings of the Court.

(a) The reference of the non-jury aspects of the cause to a Special Master was improper.

(b) The failure of the Court to arrange for the presence of Appellant at the trial of the matter, both before the Special Master and before the District Court, over the objections of counsel, during a time when she was incarcerated in the Womens State Prison at Frontera, California, under the jurisdiction of the State of California, constituted a denial of due process under the Fifth Amendment of the United States Constitution [S.M. Tr. p. 4, line 7, to p. 14, line 2; D.C. Tr. p. 39, line 6, to p. 47, line 14].

II.

The evidence adduced at both the first trial before the Special Master and the second trial before the District Court is insufficient to justify the order of adjudication.

(a) Appellees failed to introduce a prima facie case as to the insolvency of Appellant on March 13, 1963, or March 22, 1963, and failed to show that Appellant was unable to pay her debts as they became due on said dates, [D.C. Tr. p. 131, lines 7-25, D.C. Tr. p. 110, line 15, to p. 112, line 10, D.C. Tr. p. 145, line 6, to p. 153, line 11, D.C. Tr. p. 61, line 14, to p. 64, line 15].

(b) The report and findings of the Special Master [R. 350] were based upon insufficient evidence and were objected to by Appellant [R. 361-363]. The said findings of the Special Master, which were objected to, are as follows:

1. The claims asserted by JOSEPH E. HAZEL, REBECCA M. HAZEL, JOHN J. GIOVANNONI, LOUISE M. GIOVANNONI and DOLORES KNOLL LOPEZ are debts of the Alleged Bankrupt, HENRIETTA M. FAUCHER.

2. That such obligations are unsecured debts of the Alleged Bankrupt which were in existence at the time of the filing of the Involuntary Petition herein.

3. That the Alleged Bankrupt, at the time of the filing of the Involuntary Petition against her, owed debts in excess of $1,000.00.

4. That the Petitioning Creditors do not have unclean hands and are therefore not barred

from proceeding with the Involuntary Petition proceeding instituted by them.

5. That the Alleged Bankrupt is estopped to claim that the Petitioning Creditors have unclean hands.

6. That under the circumstances of the case, the burden of proof of insolvency has shifted from Petitioning Creditors to the Alleged Bankrupt and that she has failed to assume or sustain such burden.

7. The transaction's which are the basis for Petitioning Creditors claims are not usurious.

(c) Over the objections of Appellant, the findings and report of the Special Master were affirmed by the District Court (Order Dated February 9, 1967).

(1) Finding 1 of the Special Master is claimed to be erroneous in that there was a total lack of evidence that the notes and deeds of trust were executed by Appellant. [R. 357; S.M. Tr. p. 19, lines 20-23; p. 28, lines 18-26; p. 20, lines 9-13; p. 141, lines 15-20; p. 223, lines 16-26; p. 229, line 20, to p. 230, line 2; p. 101, lines 15-22; p. 106, lines 6-16].

(2) Finding 2 is claimed to be error in that there was no evidence adduced that the obligations in question were or are debts of Appellant [R. 358; S.M. Tr. p. 435, line 10, to p. 436, line 11].

(3) Finding 4 is claimed to be error in that the evidence reflects that Appellees herein appeared before the Court below with unclean hands, in that there was ample evidence from the

face of the notes and deeds of trust that the Appellees bargained for usurious interest and discount and should therefore have been barred from proceeding with the Involuntary Petition in Bankruptcy before a Court of Equity. [R. 358; S.M. Tr. p. 44, line 1, to p. 47, line 2; p. 49, line 17, to p. 59, line 26; p. 21, lines 20-26; p. 27, line 20, to p. 28, line 11; p. 86, lines 1-7; p. 88, lines 1-4; p. 90, lines 5-7].

(4) Finding 5 of the Special Master is claimed to be error on the basis that as a matter of law, Appellant may not be estopped from claiming as a matter of defense, the unclean hands of Appellees where Appellees knowingly and intentionally entered into usurious transactions and admittedly would not have entered into said transactions had the amount of interest and discount not been in excess of the legal rate of interest under California law [R. 358; S.M. Tr. p. 86, lines 1-7; p. 88, lines 1-4; p. 90, lines 5-7; p. 142, line 23, to p. 144, line 8; p. 269, lines 13-21].

(5) Finding 6 was objected to as error on the grounds that the burden of proof on the issue of the insolvency of Appellant should have rested with Appellees and that the burden of proof should not have shifted to Appellant in that Appellant had never failed or refused to turn over her books and records, but in fact was never ordered to do so by the District Court [R. 358].

(6) Finding 7 of the Special Master is claimed to be error on the basis that the evidence sustains a finding that each of the transactions were in fact usurious [R. 358].

III.

Substantial errors in law occurred at the trial of this matter before the District Court, as follows:

(a) That the District Court, on May 3, 1967 [R. 367-368], ordered that the burden of proof on the issue of insolvency or the inability of the Appellant to pay her debts as they matured, shifted from Appellees to the Appellant, unless the Appellant appeared in Court at the trial of said issue with her books, papers and records and submitted to examination and gave testimony as to all matters tending to establish her solvency or insolvency. That said order was made at a time when the Appellant was under a civil disability and the Court was aware thereof, in that the Appellant was incarcerated in the California Prison for Women at Frontera, California, and was not present at the trial of the matter, due to the inability of the United States Marshal to obtain her presence and deliver her for the trial of this matter, despite the issuance of a Writ of Habeas Corpus Ad Testificandum by the Court [D.C. Tr. p. 39, line 6, to p. 46, line 16].

(b) Further claim of error of law was the Court's granting of Appellees' motion for a directed verdict thereby removing the decision from the jury who had heard the evidence [R. 398, D.C. Tr. p. 177, lines 4-6].

ARGUMENT.

I.

The Conduct of Appellees Is in Violation of the California Usury Laws and as Such, Appellees Have Sought the Aid of the Bankruptcy Court as a Court of Equity, Despite the Fact That Their Conduct Has Tainted Them With Unclean Hands.

It is submitted that the evidence adduced at the trial before the Special Master clearly indicates that Appellees herein voluntarily entered into a series of transactions in which they either sought to or did obtain interest in excess of that permitted under the usury laws of the State of California and that therefore, Appellees may not be permitted to seek relief from the Bankruptcy Court utilizing its equitable jurisdiction, when their violation of the California law relating to usurious interest taints them with unclean hands.

It is submitted that the following evidence adduced at the hearing before the Special Master is uncontroverted:

(a) Dolores Knoll Lopez, one of the Appellees herein, testified that on or about the month of November, 1960, she loaned the sum of $5,000.00 in consideration for which he received a Promissory Note in the face amount of $5,555.56, plus interest on said sum as appears on the face of the note [S.M. Tr. p. 21, line 20, to p. 22, line 3; Ex. 2]. This discount or bonus from the face of the note when coupled with the amount of interest apparent from the face of the note constitutes interest in excess of 10%, the amount permitted under California law. The situation is substantially the same

in connection with the testimony of Mrs. Lopez concerning the month of August, 1962, at which time she loaned the sum of $2,500.00 in consideration for which she received a Promissory Note in the face amount of $2,631.50 [Ex. 6; S.M. Tr. p. 27, line 20, to p. 28, line 11]. Mrs. Lopez testified that she considered the difference between what she loaned and the face amounts of the notes to be a bonus [S.M. Tr. p. 86, lines 1-7; p. 88, lines 1-4; p. 90, lines 5-7].

(b) In the case of Louise M. Giovannoni, the evidence is also clear that on or about the month of April, 1957, Mr. and Mrs. Giovannoni loaned the sum of $6,750.00, in consideration for which they received a series of three Promissory Notes each in the face amount of $2,500.00, for a total of $7,500.00. That although the interest provided to be paid on each note was below the maximum permitted under California law, when said interest is coupled with the amount of discount or bonus evidenced from the face of said notes, when compared to the amount of cash actually loaned, it is in excess of the legal rate of interest permitted under California law [Exs. 8, 9 and 10; S.M. Tr. p. 142, line 3, to p. 144, line 8].

(c) In addition, Mr. and Mrs. Giovannoni, on or about the month of December, 1960, loaned the sum of approximately $10,000.00 or less in consideration for which they received two Promissory Notes each in the face amount of $5,555.55, bearing interest on the face thereof at 7.2% per annum, for a total face amount of said notes in the sum of $11,111.10 [Ex. 14; S.M. Tr. p. 117, line 4, to

p. 118, line 14; p. 144, lines 6-8; p. 167, lines 16-18; p. 168, lines 17-25; p. 169, lines 6-14].

(d) On or about the month of March, 1962, Mrs. Giovannoni again loaned the sum of $10,000.00 in consideration for which she received a Promissory Note in the face amount of $11,110.00, and again when the said discount is added to the interest apparent from the face of the note, it is in excess of the rate of interest provided under California Law [Ex. 16; S.M. Tr. p. 176, lines 14-25; p. 192, line 2, to p. 198, line 14].

(e) The evidence is similarly clear in connection with Joseph E. Hazel. On or about the month of July, 1958, Mr. Hazel and Rebecca M. Hazel loaned the sum of $4,050.00 in consideration for which they received a Promissory Note in the face amount of $4,500.00, which note bore interest at the face amount of 7.2% per annum. Again the Promissory Note appears fair on its face, but when the interest is coupled with the bonus or discount, it provides for interest substantially in excess of that permitted under California law [Ex. 17; S.M. Tr. p. 224, lines 1-4].

(f) On or about the month of January, 1961, Joseph E. Hazel and Rebecca M. Hazel loaned the sum of $6,000.00 in consideration for which they received two Promissory Notes each in the face amount of $3,333.33, for a total of $6,666.66, plus interest thereon at the rate of 7.2% per annum [Ex. 19; S.M. Tr., p. 229, lines 1-6].

It must be noted that Mr. Hazel further testified, without contradiction, that but for the bonus or discount he received on the face of each note, he would

not have entered into the loan transactions [S.M. Tr. p. 269, lines 13-22].

It is thus submitted that Appellees have sought to extract and actually received usurious interest and have therefore, sought the aid of a Court of Equity with unclean hands.

In the case of *Teichner v. Klassman* (1966), 240 Cal. App. 2d 514, 49 Cal. Rptr. 742, the Court found that the loan agreements whereby Plaintiff loaned Defendant sums of money were usurious loan transactions. The Court also found that an *estoppel* does not arise simply because the borrower (in the present cause purported to be Appellant) knew of the usurious nature of the transaction, took the initiative in seeking the loan, and paid usurious interest without protest.

California law is clear that a transaction in order to be usurious does not have to be usurious on its face.

Haines v. Commercial Mortgage Co. (1927), 200 Cal. 609, 254 Pac. 956.

The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives and if that amount is more than the law allows, the offense is complete.

Thomas v. Hunt Mfg. Corp. (1954), 42 Cal. 2d 734, 269 P. 2d 12;

Kleet v. Security Acceptance Co. (1952), 38 Cal. 2d 770, 242 P. 2d 873;

Shirley v. Britt (1957), 152 Cal. App. 2d 666, 313 P. 2d 875;

Janisse v. Winston Investment Co. (1954), 154 Cal. App. 2d 580, 317 P. 2d 48;

Williams v. Reed (1957), 48 Cal. 2d 57, 307 P. 2d 353.

It should also be noted that a person, though not a party to a transaction, may attack the transaction as usurious if he is injured by it.

Roesch v. DeMota (1944), 24 Cal. 2d 562, 150 P. 2d 422.

It is true that the question of usury is not raised for the purpose of defeating Appellees as creditors, but merely to disqualify them from acting as Petitioning Creditors in an involuntary bankruptcy proceeding on the basis that their conduct is tainted with unclean hands and that therefore, they may not be aided by a Court of Equity as a result of this conduct in violation of the usury laws of the State of California.

The policy of the State of California, as concerns the question of usury limiting interest to 10%, is included directly in the State Constitution Article XX, Section 22. It is worthy of note that usury in certain instances has been made a misdeameanor and therefore, a criminal violation under California law.

Derring's General Law, Act 3757, Section 3.

Where a lender receives a Promissory Note for a greater amount than the principal amount of the loan which he actually makes, this constitutes usury.

Henning v. Akin (1928), 91 Cal. App. 246, 266 Pac. 981;

Richlin v. Schleimer (1932), 120 Cal. App. 40, 7 P. 2d 711;

Courtney v. Tufeld (1932), 128 Cal. App. 504, 17 P. 2d 1035;

Anderson v. Lee (1951), 103 Cal. App. 2d 24, 228 P. 2d 613.

A "bonus or discount" is treated as interest in determining the existence of usury.

Williams v. Reed (1957), 48 Cal. 2d 57, 307 P. 2d 353.

When a transaction violates the usury law, the intent of the parties is immaterial, nor is it material that the borrower rather than the lender took the initiative in the transaction.

Martin v. Kuchler (1931), 212 Cal. 536, 299 Pac. 52;

Martin v. Ajax Construction Co. (1954), 124 Cal. App. 2d 425, 269 P. 2d 132;

Williams v. Reed, supra.

It is submitted that bankruptcy actions are equitable in nature and are therefore, controlled by equitable principles.

Cowan's Bankruptcy Law, Section 1075, page 627;

In Re Christensen (1900), 101 Fed. 243;

Precision Instrument Mfg. Co. v. Automotive M. M. Co. (1945), 324 U.S. 306, 65 S. Ct. 993.

Where a party has been guilty of improper conduct which violates the basic rules of equity jurisprudence, equity must deny him any recognition or relief.

DeGarmo v. Goldman (1942), 19 Cal. 2d 755, 123 P. 2d 1;

Crittenden v. McCleod (1951), 106 Cal. App. 2d 42, 234 P. 2d 642;

Katz v. Karlsson (1948), 84 Cal. App. 2d 469, 191 P. 2d 541.

In *DeGarmo v. Goldman, supra,* the Court stated, in substance, that it is not only the fraud or the commission of an illegal act that will prevent the Plaintiff from gaining admission into the Court, but any unconscientious conduct on his part, related to the controversy at hand will keep him out.

In *Katz v. Karlsson, supra,* the Court stated, in substance, that a Plaintiff's improper conduct need not be of a criminal character or even of a nature sufficient to constitute the basis of a cause of action against him. His hands are rendered unclean within the purview of the maxim by any form of conduct that, in the eyes of honest and fairminded men may properly be condemned, and pronounced wrongful.

It is submitted that the participation in usurious transactions by Appellees herein, taints them with unclean hands and therefore, equitable relief of any kind should have been denied to them, and the Court below should have refused to lend its aid and dismissed the petition.

30 *Corpus Juris Secundum,* Equity, Section 93;

Gavina v. Smith (1944), 25 Cal. 2d 501, 154 P. 2d 681.

Even though the Trial Court may have felt that Appellant's conduct was wrongful, the relief prayed for

by Appellees should have been denied, under the doctrine of unclean hands.

Precision Instrument Mfg. Co., v. Automotive M. M. Co., supra;

In Re Christensen, supra.

It is often stated that the theory and principal purpose of the unclean hands doctrine is to preserve and protect the integrity of the Court.

Katz v. Karlsson, supra;

Gaudiosi v. Mellon (CCA 3rd 1959), 269 F. 2d 873, Cert. Denied 361 U.S. 903.

The doctrine of unclean hands is applicable to bankruptcy proceedings.

8 *Corpus Juris Secundum,* Bankruptcy, Section 22;

Bolling v. Bowen (CCA 4th 1941), 118 F. 2d 59.

In the case of *Precision Instrument Mfg. Co. v. Automotive M. M. Co., supra,* the Court held that the doors of the Court of Equity would be closed to one tainted with bad faith, however improper may have been the behavior of the Defendant. This doctiine is rooted in the historical concept of the Court of Equity as the vehicle for affirmatively enforcing the requirements of conscience and good faith.

It is submitted that the uncontroverted testimony of Appellees herein clearly reflects that they sought to and did obtain payment of interest and bonus or discount in excess of the rate provided under California law and that therefore, they sought to extract usurious interest thereby tainting them with unclean hands before a Court of Equity. It is further apparent that

there was a total lack of evidence at the trial of this cause that the Promissory Notes and Deeds of Trust in question were in fact signed by Appellant herein or that the said documents bore the name of Appellant, nor was there documentary evidence submitted that any of the loan obligations claimed by Appellees were in fact debts or obligations of Appellant, or that Appellant, in fact, owed any financial obligation to Appellees. Specific references to the transcripts in connection with these matters has heretofore been set forth within the Specification of Errors.

II.

The Exclusion of Appellant From the Trial of This Cause Violated the Due Process Protection Guaranteed to Her Under the Constitution of the United States.

It is submitted that the proceedings herein, both before the Special Master and before the District Court violated the Constitutional rights of Appellant under and pursuant to the Fifth Amendment of the United States Constitution, in that Appellant has been denied Due Process of Law.

Pursuant to order of the District Court, counsel for Appellant prepared a Writ of Habeas Corpus Ad Testificandum and an order thereon which was executed by the Judge of the District Court, directing George E. O'Brien, United States Marshal for the Southern District of California, to bring and deliver Appellant to the Courtroom of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, serving herein as Special Master, for the purpose of being in attendance at the trial of the matter. In violation of the said order for Writ of Habeas Corpus Ad Testificandum, Appellant was not

delivered to the proceedings before the Special Master from the California Institution for Women and was, therefore, deprived of her right to be present at the trial of the cause before the Special Master. Over the objection of counsel for Appellant, the Special Master proceeded with the trial of the matter despite the absence of Appellant by virtue of the failure of the United States Marshal to deliver her to the Federal Court for the purpose of being present at the proceeding [S.M. Tr. p. 4, line 7, to p. 14, line 1; R. 352, line 7, to p. 354, line 21].

A similar set of facts existed in connection with the jury trial portion of the cause before the District Court. At that time the Court ordered the issuance of a Writ of Habeas Corpus Ad Testificandum again to George E. O'Brien, United States Marshal, and the California Institution for Women, at Frontera, California, ordering and directing Appellant to be brought to the Courtroom on May 3, 1967, for the jury trial. In connection therewith, costs were paid through counsel for Appellant, however, Appellant was not delivered to the Courtroom by the United States Marshal and appeared at no stage of the proceeding nor was she permitted to appear at any trial stage of the proceeding [R. 366; D.C. Tr. p. 39, line 6, to p. 46, line 3].

Excluding a Defendant from participation in a trial for failure to pay suit money and alimony was held a denial of due process.

Hutchinson v. Hutchinson, 126 Ore. 519, 270 Pac. 484, 62 A.L.R. 660;

Collins v. Superior Court (1956), 145 Cal. App. 2d 588, 302 P. 2d 805;

Hayman v. Morris, 37 N.Y.S. 2d 84.

A Defendant must have an opportunity to be heard in his own defense.

Beck v. Occidental Life Ins. Co. (C.C.A. 10th, 1938), 95 F. 2d 935, Cert. denied 59 S. Ct. 305, 63 U.S. 603;

Hicklin v. Edwards (C.C.A. Mo. 1955), 226 F. 2d 410.

An essential element of due process of law is a hearing or an opportunity to be heard on the merits of a cause. This is a matter of right and this element of due process includes the right of the party to be present during the taking of testimony or evidence and to hear the evidence introduced against him.

Remington Athletic Commission v. Bratton, 117 Pa., *supra,* 598, 112 A. 2d 422.

In the *Remington Athletic Commission v. Bratton,* case, the Court states:

> "There is no hearing when the affected party has not the means of knowing what evidence is offered or considered and is not afforded an opportunity to test, explain or refute it."

It is thus submitted that the exclusion of Appellant from participation in both segments of the trial of this cause was improper and constitutes a denial of due process of law.

Arrington v. Robertson (C.C.A. 3rd 1940), 114 F. 2d 821;

Ah Fook Chang v. United States (C.C.A. 9th 1937), 91 F. 2d 805.

It is respectfully suggested that the failure of the United States Marshal to have the Appellant present

for the trials and the failure of the District Court to properly enforce its order for issuance of Writ of Habeas Corpus Ad Testificandum prevented Appellant from confronting the witnesses against her, from knowing what evidence was offered against her and from having an opportunity to explain or refute the evidence if such was her desire, and thereby effectively deprived Appellant of her assets, estate and property in the nature of a forfeiture, without a real opportunity to present testimony on her own behalf, all of which constitutes a violation of her constitutional rights of due process under the Fifth Amendment of the Constitution of the United States.

III.

The District Court Erred in Shifting the Burden of Proof on the Question of Insolvency From Appellees to Appellant.

The Bankruptcy Act, Title 11, Section 21, provides that in connection with the two acts of bankruptcy alleged by Appellees, that the acts must have occurred at a time when the Appellant was insolvent. In this connection, petitioning creditors are normally obligated to prove the insolvency of the alleged bankrupt at the time of the commission of the alleged act or acts of bankruptcy.

> *In re Rome Planing Mill* (1899), 96 Fed. 812;
> *National Refining Company v. Pennsylvania Petroleum Company* (C.C.A. 8th 1933), 66 F. 2d 914, Cert. Den. 291 U.S. 667.

It is true that the burden of proof on the question of insolvency may shift from petitioning creditors to the alleged bankrupt under certain circumstances, one of

which is the refusal of the alleged bankrupt to appear with her books and records. It is also true in the event the alleged bankrupt has a satisfactory explanation for not presenting books and records, that the burden of proof does not shift and the petitioning creditors maintain the burden of proving the insolvency.

> *Cummins Grocer Co. v. Talley* (C.C.A. 6th 1911), 187 Fed. 507.

The District Court, in its order of May 3, 1967 [R. 367], amended Finding 6 of the Special Master as follows:

> "The burden of proof on the issue of insolvency of the Alleged Bankrupt or the inability of the Alleged Bankrupt to pay her debts as they mature will shift from Petitioning Creditors to the Alleged Bankrupt at the trial of that issue unless the Alleged Bankrupt appears in Court at the trial of said issue with her books, papers and accounts and submits to an examination and gives testimony as to all matters tending to establish insolvency or solvency and the ability or inability of the Alleged Bankrupt to pay her debts as they mature, as provided in Section 3 (b) of the Bankruptcy Act (11 U.S.C. Section 21)."

The file in the present cause will reflect that at no time prior to the said order of May 3, 1967, was Appellant ordered or instructed to appear and produce her books and records but in fact, a prior motion of Appellees for a turn-over order of books, records and documents was denied by the Presiding Judge of the District Court [R. 226, 230-231].

It is submitted that Appellant's exercise of her constitutional privilege against self-incrimination is in itself a satisfactory explanation for not turning over books, records and documents and that the burden of proof should therefore not have shifted to Appellant, but should have been carried in the usual manner by Appellees.

The fact that the Court in its Order of May 3, 1967 [R. 367-368], ordered the shifting of the burden of proof from Appellees to Appellant at a time when the District Court was aware that its order for Writ of Habeas Corpus Ad Testificandum had not been effected by the United States Marshal and that therefore, the Appellant could not possibly appear at the trial of the matter and could not produce books, records, papers and documents seems to be ample evidence that the burden of proof was shifted from Appellees to Appellant without due process of law and without consideration of the fact that such appearance and presentation could not be made.

If an alleged bankrupt has been lawfully deprived of her books and records, the burden of proof on the question of insolvency does not shift but remains with the petitioning creditors.

> *In re Ross and O'Brien Iron Works, Inc.* (CCA 2d 1932), 58 F. 2d 961.

It is suggested in the present cause that Appellant had in fact been deprived of her books and records in that she was incarcerated in the California Institution for Women as a result of which she was not able to appear for the trial of this matter, nor was she, while incarcerated, in possession of any books, records or

documents and that Appellant therefore had been substantially deprived, as a result of her incarceration, of said books, records and documents and was not physically able to produce the same.

That as a result of the District Court's Order of May 3, 1967 [R. 367-368], Appellees were not required to establish the usual burden of proof on the insolvency of Appellant and were therefore able to obtain Appellant's adjudication as a bankrupt without proving the necessary elements of the acts of bankruptcy alleged, namely Appellant's insolvency at the time of the levy of the Writ of Attachment and/or at the time of the appointment of the California State Court Receiver.

IV.

The District Court Improperly Directed a Verdict in Favor of Appellees.

The District Court, after three partial days of jury trial, upon motion of Appellees, directed a verdict of adjudication of bankruptcy against Appellant [D.C. Tr. p. 177, lines 4-6; R. 396-398].

The District Court, in its Findings of Fact [R. 397], stated as follows:

> "The Petitioning Creditors presented evidence which was sufficient to establish a prima facie case that the Alleged Bankrupt was unable to pay her debts as they mature on the date of the acts of bankruptcy alleged. The Alleged Bankrupt produced evidence in defense of the charge of the Petitioning Creditors and rested. The Petitioning Creditors moved for a directed verdict. The fact that the Alleged Bankrupt was unable to pay her

debts as they mature on the dates of the acts of bankruptcy alleged by Petitioning Creditors was supported by the overwhelming weight of the evidence and the inferences to be drawn therefrom. Reasonable men could not possibly come to a different conclusion. Accordingly, the Court granted the motion of the Petitioning Creditors and directed a verdict that the Alleged Bankrupt was unable to pay her debts as they mature on the dates of the acts of bankruptcy alleged and based upon said verdict, the Court so finds."

A motion for a directed verdict may properly be granted only when a jury verdict in the other party's favor would have to be set aside by the Court.

Standard Accident Ins. Co. v. Winget (9th Cir. 1952), 197 F. 2d 97;

Wong v. Swier (9th Cir. 1959), 267 F. 2d 749;

Hawley v. Alaska S.S. Co. (9th Cir. 1956), 236 F. 2d 307.

In deciding whether to direct a verdict under Rule 50 of the Rules of Civil Procedure, the Court must determine whether the evidence, in its entirety would rationally support a verdict for the party opposing the motion assuming that the jury took a view of the evidence most favorable to the opposing party.

Phipps v. N.V. Nederlandsche Amerikaansche Stoomvart, Maats (9th Cir. 1958), 259 F. 2d 143.

A directed verdict is not proper when the evidence is conflicting or insufficient to support only one certain verdict.

Courtney v. Custer County Bank (9th Cir. 1952), 198 F. 2d 828.

In the present cause, it is submitted, that the evidence adduced during the jury trial portion would not rationally support a verdict in favor of Appellees had the jury taken a view of the evidence most favorable to Appellant. It is further submitted that the Court did not extend to Appellant all favorable inferences that could have been drawn from the evidence.

This Honorable Court's attention is respectfully directed to the argument of counsel before the District Court, in connection with the motion for directed verdict [D.C. Tr. p. 145, line 2, to p. 154, line 10]. It should be specifically noted that when counsel for Appellant, in argument to the Court, reflected upon the disparity in Mr. Giovannoni's testimony as to the return of a check for insufficient funds, the Court stated:

"Thats for the jury." [D.C. Tr. p. 152, line 14].

The testimony of Mr. R. E. Allen, Receiver appointed by the California Superior Court, supplies ample evidence, at least sufficient to go to the jury, as to the solvency of Appellant and of her ability to pay her debts as they became due. Mr. Allen testified that on or about March 22, 1963, he took possession of the assets and properties of Appellant which he described as 71 parcels of real property and 25 Promissory Notes. [D.C. Tr. p. 50, line 20, to p. 51, line 16] and that the gross value of said parcels of real property was approximately $550,000.00, with an equity of approximately $150,000.00 [D.C. Tr. p. 58, line 20, to p. 59, line 8]. He further testified that he actually received $30,000.00 net realization from the equity [D.C. Tr. p. 60, lines 10-13]. The State Court Receiver commenced

to collect rents on these properties at the rate of approximately $5,000.00 per month [D.C. Tr. p. 61, lines 14-19]. Mr. Allen further testified that during the course of his receivership that he had not received a claim by any creditor of Appellant. [D.C. Tr. p. 67, lines 7-24].

Myrtle Athey called as a witness on behalf of Appellees, under cross-examination by counsel for Appellant, testified that on March 13, 1963, the date of the first alleged act of bankruptcy, that there existed a balance in the bank account of Appellant in the sum of $4,-081.41 [D.C. Tr. p. 115, lines 22-25] and that even on March 14, 1963, the day after the alleged act of bankruptcy, Appellant had funds in her account, but for an incorrect debit memo which had been debited by the bank, and later recredited to the account [D.C. Tr. p. 117, lines 9-17].

Mrs. Athey further testified that she had no knowledge of any other bank accounts which Appellant may have had at any other banking institutions and in fact was only apprised of the balance in the one particular account at her bank [D.C. Tr. p. 115, lines 11-21].

The testimony of Rebecca Hazel, upon cross-examination, indicated clearly that the payment which was due to her in March was in fact made and received by her on or about March 8, 1963, although the same was not due until March 12, 1963, and that she did not attempt to deposit the same for more than one month later, to wit, the month of April, 1963, at which time the same was returned for insufficient funds [D.C. Tr. p. 131, lines 7-25]. It is therefore submitted that the testimony of Rebecca Hazel in no way enforces Appellees' contention that Appellant was unable to pay her

debts as they became due on March 13, 1963, as there was no attempt by the witness to deposit the check at that time. That in fact, had the check been deposited by her on or about March 8, 1963, the date in which it was received, there was substantial funds in the account at that time [D.C. Tr. p. 115, lines 22-25].

The testimony of John J. Giovannoni on cross-examination again reflects the substantial issues to be decided by the jury in this matter. Mr. Giovannoni testified that he received his March payment from Appellant approximately the 5th or 6th of March and deposited the same in his bank. That a few days thereafter it was returned from his bank with a notation of insufficient funds [D.C. Tr. p. 138, line 10, to p. 139, line 19]. However, the evidence is clear that Mr. Giovannoni did not specifically recollect whether he made a deposit of the check in the month of March, 1963, or April, 1963, and did not specifically recall whether the check was returned to him for insufficient funds in the month of March or April, 1963 [D.C. Tr. p. 141, lines 8-15]. Counsel for Appellant submitted Exhibit 28 for Mr. Giovannoni's inspection, the bank statement of the Security First National Bank, which did not reflect the return of any check for insufficient funds, except one dated April 4, 1963 [D.C. Tr. p. 140, lines 10-25].

During the course of cross-examination the witness indicated his desire to look at the check, however, the statement of counsel for Appellees indicated that the

check was apparently missing although the witness had indicated that he had given the same to counsel [D.C. Tr. p. 141, line 19, to p. 142, line 3]. It was, therefore, impossible to substantiate the precise date on which the check was returned from the bank for insufficient funds if in fact it was, although the bank statements of Security First National Bank for the months of March and April, 1963, reflected only the return of one check on April 4, 1963, substantially after the date of March 13 or 22, 1963, which are the determining dates insofar as the insolvency or inability of Appellant to pay her debts as they become due is concerned.

It is thus respectfully submitted that there was a total lack of evidence by Appellees of Appellant's inability to pay her debts as they matured on the dates of March 13 and March 22, 1963, and that neither the overwhelming weight of the evidence nor any inferences to be drawn therefrom created a sufficient presumption to direct a verdict and take the decision away from the jury. Reasonable men could have come to a different conclusion than that reached by the Court and therefore, the Court's directed verdict was improper, created substantial error and deprived Appellant of her right to a jury determination of this cause.

V.
Conclusion.

It is submitted, based upon a review of the Specification of Errors, and Argument in connection therewith, that Appellant should not have been adjudicated a bankrupt and that the Petition of Appellees for Involuntary Bankruptcy should have been denied. That Appellees had participated knowingly and voluntarily in a series of usurious transactions in violation of California law and therefore sought relief before the Bankruptcy Court as a Court of Equity with Unclean Hands.

That Appellant has been denied Due Process of Law pursuant to the Constitution of the United States in that she was not permitted to appear and be present for either the non-jury trial before the Special Master or the jury trial before the District Court as a result of her incarceration by the California State authorities.

It is further suggested that the shifting of the burden of proof from Appellees to Appellant on the question of the insolvency of Appellant was improper in that Appellant at no time was ordered to deliver her books and records to the Bankruptcy Court. That the requirement of attendance of Appellant at the trial before the District Court and the production of her books, records and documents at that time, was in fact a denial of due process of law as the Court was fully apprised at that time that the United States Marshall had been unable to deliver her to the Courtroom for trial despite his order for Writ of Habeas Corpus Ad Testificandum and that the California State authorities refused to comply with the Writ ordered by the Judge of the District Court and refused to deliver Appel-

lant to the United States Marshal for her attendance at trial.

It is additionally submitted, as specified in the Specification of Errors, that the findings of the Special Master, each of which were objected to, and which objections were overruled by the District Court, were erroneous and that there is a complete dirth of evidence reflecting that the notes and deeds of trust in question were executed by Appellant or that they bore her name nor was any evidence adduced substantiating debts or obligations due or owing from Appellant to Appellees.

It is thus respectfully submitted that the judgment of adjudication of bankruptcy be reversed and that the Involuntary Petition in Bankruptcy of Appellees be ordered dismissed.

Respectfully submitted,

HOWARD L. THALER,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD L. THALER

APPENDIX A.

Exhibit No.	Description	For Identification S.M. Tr. page	In Evidence page
1.	Letter addressed to Dolores K. Lopez from H. M. Faucher dated 11-20-60	21	21
2.	Promissory Note, deed of trust, Policy of title, Pena	22	22
3.	Photocopies of two checks: Check #201074 in the sum of $4,000 First Federal Savings and Check #537 in the sum of $555.56 made payable to Mrs. H. M. Faucher	25	135
4.	Letter addressed to Mrs. Dolores Knoll Lopez dated 5-1-62 from H. M. Faucher	26	26
5.	Photocopy of Check #0721271 dated 8-27-62 in the sum of $2,500 made payable to H. M. Faucher	27	134
6.	Note and deed of trust	28	28
7.	Letter addressed to "Luisa" dated 4-30-57 on stationery with heading "H. M. Faucher"	99	99
8.	Promissory note, deed of trust, policy of title insurance dated 3-20-57—Lot 85, $2,500	101	101
9.	Promissory note, deed of trust, policy of title insurance dated 3-20-57—Lot 83, $2,500	102	102
10.	Promissory note, deed of trust, policy of title insurance dated 3-20-57—Lot 84	107	107
11.	Three payment books re trust deeds	108	108
12.	Cancelled check #62 dated 4-6-57 to H. M. Faucher in the sum of $6,750	109	109

Exhibit No.	Description	For Identification S.M. Tr. page	In Evidence page
13.	Note, deed of trust, policy of title insurance and payment book Lot 134 dated 4-18-57	113	113
14.	Letter dated 12-3-60, note, deed of trust, policy of insurance dated 10-28-60—Lot 39. Note, deed of trust, policy of title insurance dated 10-28-60 —Lot 38 Check book and Statement of Account	120	120
15.	Two check register booklets and Statement of Account with Bank of America	131	131
16.	Statement of Account dated 4-10-62 note, deed of trust, policy of title insurance dated 2-1-62—Lot 7	178	178
17.	Note, deed of trust, policy of title insurance, dated 7-12-58. Lot 183 receipt in the sum of $4,050. Cancelled check dated 7-23-58 #249 made payable to H. M. Faucher in the sum of $1,750. Depositor's record and payment record	225	225
18.	Note, deed of trust, policy of title ins. dated 1-7-61—Lot 135 Payment record	228	228
19.	Note, deed of trust, policy of title ins. dated 1-11-60—Lot 8	231	231
20.	Statement of Accounts with Security First National Bank and California Bank; Check stubs for California Bank	232	232
21.	Agreement	239	239
22.	Photocopies of two grant deeds (certified)	318	—

Exhibit No.	Description	For Identification S.M. Tr. page	In Evidence page
23.	Blank policy of title ins.	359	359
24.	Guaranteed chain-of-title report #6295644	365	365
25.	Guaranteed chain-of-title report #6295643	368	368
26.	Guaranteed Chain-of-title report #6295645	376	376
27.	Signature card—Security First National Bank — H. M. Faucher	383	383
28.	Security First National Bank ledger sheets	439	—
29.	Reporter's transcript of hearing held on 8-16-63 and 8-23-63 (excerpts)	439	439